A

LEE AH SIN v. WASUNAN TONRAB & ANOR

COURT OF APPEAL, PUTRAJAYA
AZIZAH NAWAWI JCA
S NANTHA BALAN JCA
DARRYL GOON SIEW CHYE JCA
B [CIVIL APPEAL NO: J-02(IM)(NCVC)-1527-10-2020]
9 FEBRUARY 2022

Abstract – *Order 14 of the Rules of Court 2012 is not applicable to contest probate matters which are governed exclusively by O. 72 and which must ordinarily be dealt with at a full trial. The only occasion when a contentious probate may be disposed of summarily is via the procedure as prescribed and on the occasion when O. 71 r. 38(1) and (2) applies.*

C

D

CIVIL PROCEDURE: *Judgments and orders – Summary judgment – Probate action – Disputes regarding validity of wills – Whether matter could be decided summarily by affidavits – Whether there were contentious issues that must be dealt with at trial – Whether summary judgment procedure applicable to probate action – Rules of Court 2012, O. 14, O. 72*

E

This was an appeal by the appellant ('defendant') against the decision of the Judicial Commissioner ('JC') in a probate action ('Suit 149') wherein the JC allowed the respondents' ('plaintiffs') application filed under O. 14 r. 1 of the Rules of Court 2012 ('ROC') and granted summary judgment and declared
F the last will and testament of the deceased dated 17 July 2018 ('2018 will') was valid and that the deceased's earlier will dated 1 April 2005 ('2005 will') was revoked. The plaintiffs were the daughters of the deceased and the propounders of the 2018 will while the defendant was the deceased's brother and the propounder of the 2005 will and the sole executor of the deceased's estate under the 2005 will. The defendant challenged the 2018 will on the
G grounds that: (i) the deceased lacked the requisite testamentary capacity as he suffered from a stroke; and (ii) there were suspicious circumstances surrounding the making of the 2018 will and that the 2018 will was the product of undue influence by the plaintiffs. The subject matter of the 2018 will was a parcel of land ('property'). Under the 2018 will, the deceased
H purported to bequeath to the plaintiffs jointly and equally all his legal and beneficial rights, profits and benefits in the whole share of the property. Insofar as the property was concerned, the defendant contended (i) that the deceased was only a bare trustee and could not lawfully bequeath the property of any interest therein; and (ii) the deceased had no legal right to
I enter a lien-holder's caveat. The JC held that based on the affidavits filed, the 2018 will was executed in accordance with s. 5(2) of the Wills Act 1959 ('Act'). Accordingly, the JC granted the 2018 will, cancelled the probate which the defendant had lodged and issued the grant of probate to the

plaintiffs. Hence, this appeal by the defendant. The issues that arose were: (i) whether the summary judgment procedure which was applicable to writ action (save for 'excluded matters' as per O. 14 r. 1(2) of the ROC) applied to a probate action under O. 72 of the ROC; and (ii) whether on the facts, the JC was correct to have allowed summary judgment and granted probate based on the 2018 will.

Held (allowing appeal)
Per S Nantha Balan JCA delivering the judgment of the court:

(1) The JC misdirected himself in ruling that O. 14 r. 1 of the ROC was applicable to probate actions and in relying upon affidavits and reaching the conclusion that the 2018 will was valid and that the plaintiffs, as propounders of the 2018 will, had proven the deceased had testamentary capacity at the time when the 2018 will was allegedly executed. The JC had overlooked s. 3 of the Act. (paras 50 & 57)

(2) Order 14 of the ROC does not apply to probate action which is solely governed by O. 72 of the ROC. If the matter is to be dealt with summarily without a trial, then that can only happen at the stage when the non-contentious matter has morphed into a contentious probate matter per O. 72 r. 37(14) and the matter is then referred to a judge who 'may dispose of the matter in dispute in a summary manner or direct that the provisions on O. 72 of the ROC shall apply'. Where a matter is directed to be disposed of summarily, then following O. 71 r. 38(2) of the ROC, the originating summons, if any, 'shall ordinarily be adjourned to open court for hearing and the court may on such adjourned hearing grant or refuse the prayer in the originating summons or make such other order as may be just'. (paras 62 & 63)

(3) There was no attempt by the parties in the originating summons (OS 371) to invoke O. 71 r. 38 for the matter to be dealt with in a summary manner. Hence, the opportunity for a summary disposal of the probate proceedings was not availed. There was no doubt that Suit 149 was a probate action and the relevant procedure that would apply was as prescribed in O. 72 of the ROC. From a reading of O. 72 of the ROC, there was no room for the importation of O. 14 of the ROC such that probate could be granted summarily based on affidavits. (para 64)

(4) Once the matter is deemed to be 'contested' as per O. 71 r. 37 of the ROC, the matter becomes a probate action. The issues in contention must necessarily be dealt with at a trial of the action, where it would be necessary for the contestants to do all that is prescribed in O. 72 of the ROC and to bring forward all the necessary evidence, which would include the oral testimony of the relevant witnesses, such as evidence of the medical practitioners who treated the testator for his ailment *ie,* stroke. It would be necessary for the plaintiffs and the defendant to give oral evidence in relation to the several matters alluded to in the

pleadings, particularly in regard to the allegations of lack of testamentary capacity, suspicious circumstances and undue influence. (paras 65 & 66)

(5) As there were issues which had to be determined at trial, summary judgment ought not to have been granted. There were merits in the appeal as this involved a contentious probate matter that should proceed for trial. The order of the High Court was set aside. (para 79)

(6) The plaintiffs were the protagonists of the probate action and they were the propounders of the 2018 will. Hence, the burden of proof in regard to the validity of the 2018 will rested on the plaintiffs who had the initial burden of proving that the deceased had the requisite testamentary capacity and that there was due execution of the 2018 will *ie*, that the 2018 will was executed in accordance with the Act. However, it was clear that the JC shifted the burden on to the defendant to prove that the deceased lacked testamentary capacity when plaintiffs had not even established by satisfactory evidence that the deceased had the requisite testamentary capacity at the critical moment when he executed the 2018 will. (paras 35 & 77)

Case(s) referred to:

Banks v. Goodfellow 39 LJQB 237 ***(refd)***
Chin Jhin Thien & Anor v. Chin Huat Yean & Anor [2020] 7 CLJ 137 FC ***(refd)***
Choo Mooi Kooi v. Choo Choon Jin & Other Cases [2012] 3 CLJ 477 HC ***(refd)***
Cushway v. Harris [2012] EWHC 2273 ***(refd)***
H Venkatachala Iyengar v. BN Thimmajamma & Others 1959 AIR 443 ***(refd)***
Hawes v. Burgess [2013] EWCA Civ 94 ***(refd)***
KTL Sdn Bhd & Anor v. Leong Oow Lai & Other Cases [2014] 1 LNS 427 HC ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Pendock Barry v. James Butlin (1838) 2 Moore 480 ***(refd)***
Randolph Yap Pow Kong & Anor v. Yvonne Yap Yoke Sum & Ors [2010] 1 LNS 684 HC ***(refd)***
Tho Yow Pew & Anor v. Chua Kooi Hean [2002] 4 CLJ 90 FC ***(refd)***
Wasunan Tonrab & Anor v. Lee Ah Sin [2020] 1 LNS 2265 HC ***(refd)***

Legislation referred to:

Probate and Administration Act 1959, ss. 2(1), 3
Rules of Court 2012, O. 13, O. 14 r. 1(2), O. 37 r. 39, O. 71 rr. 37(1), (8), (10), (14), 38(1), (2), O. 72 rr. 1(2), 2, 4, 9, 10(2), (3), 37(14)
Wills Act 1959, ss. 2, 3, 5(2)

For the appellants - Nurashidah Md Razip & Mohd Amirul Asyraf Bini Mazuri; M/s Chiong & Partners
For the respondents - Clarence Edwin, R Paramanandan & S Humah Devi; M/s Clarence Edwin Law Offices

[Editor's note: For the High Court judgment, please see Wasunan Tonrab & Anor v. Lee Ah Sin [2020] 1 LNS 2265 (overruled).]

Reported by Lina E

JUDGMENT

S Nantha Balan JCA:

Introduction

[1] This is an appeal by Lee Ah Sin @ Lee Sin Kee ("defendant") against the decision of the learned Judicial Commissioner ("JC") of the High Court at Johor Bharu dated 23 September 2020 in a probate action, *viz* Johor Bharu High Court Suit No. JA-22NCvC-149-09-2019 ("suit 149") wherein the JC allowed the plaintiffs' application dated 13 November 2019 (encl. 7) filed pursuant to O. 14 r. 1 of the Rules of Court 2012 ("ROC") and granted summary judgment and declared that the last will and testament of Mr Lee Poi Sam ("deceased") dated 17 July 2018 ("2018 will") is valid and that the deceased's earlier will which is dated 1 April 2005 ("2005 will"), is revoked. Accordingly, the JC granted probate based on the 2018 will. The JC also cancelled Probate Caveat No. WA-Kaveat-1824-07-2019 ("caveat 1824") which the defendant had lodged in the Central Registry in the Kuala Lumpur High Court based on his interest in the estate of the deceased under the 2005 will.

[2] We are compelled to state that we find it rather unusual that the plaintiffs, being propounders of the 2018 will, had moved the High Court under O. 14 r. 1 of the ROC and sought summary judgment in respect of the reliefs sought in Suit 149, *albeit* that the validity of the 2018 will (per the pleadings and affidavits) was challenged by the defendant on grounds which are said to vitiate the 2018 will.

[3] At any rate, the first question is whether O. 14 r. 1 of the ROC applies to a (contested) probate action which is governed by O. 72 of the ROC and consequently whether summary judgment may be entered and probate granted accordingly. If O. 14 r. 1 of the ROC applies, then the next question (which will be fact sensitive) is whether summary judgment can be entered and probate granted in respect of an alleged will which is being challenged as being null and void due to the testator's lack of testamentary capacity, the presence of suspicious circumstances surrounding the making of the alleged will and/or that the will was procured through the undue influence of the propounders of the alleged will.

[4] For convenience and ease of reference, we shall refer to the parties by their titles in the High Court, *ie*, appellant as "defendant" and respondents as "plaintiffs".

[5] In Suit 149, the plaintiffs were the propounders of the 2018 will whereas the defendant was (*via* his defence and counterclaim) was the propounder of the 2005 will.

[6] The plaintiffs' status as propounders of the 2018 will is significant in the context of the burden to adduce satisfactory evidence to prove that the 2018 will was (i) executed in accordance with s. 5(2) of the Wills Act 1959 and to satisfy the probate court's "judicial conscience" that (ii) the deceased had the requisite testamentary capacity at the critical moment when he executed the impugned testamentary document on 17 July 2018 and that (iii) there were no suspicious circumstances (as alleged by the defendant).

[7] The plaintiffs are the daughters of the deceased. The deceased died on 23 June 2019. The plaintiffs are citizens of Thailand and are residents of that country. The plaintiffs filed Suit 149 for a declaration that the 2018 will was valid. They also sought a declaration that the 2005 will had been validly revoked and was accordingly null and void. The defendant is the brother of the deceased. The deceased had other brothers. Under the 2005 will, the defendant was named as the sole executor and beneficiary of the deceased's estate.

[8] By way of the defence and counterclaim in Suit 149, the defendant challenged the 2018 will on the grounds that the deceased lacked the requisite testamentary capacity, that there were suspicious circumstances surrounding the making of the 2018 will and that the 2018 will was the product of undue influence by the plaintiffs.

[9] However, the JC held that based on the affidavits that were filed in respect of encl. 7, the 2018 will was executed in accordance with s. 5(2) of the Wills Act 1959, that it was not proven that the deceased lacked testamentary capacity, that there was no basis for the defendant's allegation of suspicious circumstances, and that there was no proof of any undue influence.

2016 Will

[10] According to the plaintiffs, the deceased also made a will dated 27 April 2016 ("2016 will") by which all earlier testamentary dispositions had been revoked. As such, pursuant to the 2016 will, the 2005 will had been revoked. The plaintiffs highlighted that the defendant did not challenge the validity of the 2016 will. As such, it is the plaintiffs' position that the 2016 will had revoked the 2005 will. Under the 2016 will the deceased had named the first plaintiff as the sole executor and beneficiary of his estate, whereas under the 2018 will, the deceased had named the first and second plaintiffs as the executrixes and beneficiaries of his estate. As such, it was contended that the 2005 will was revoked twice and was therefore invalid.

Probate Action – Order 71 And 72 ROC

[11] At the outset, it is important to state that parties have agreed that Suit 149 is a "probate action" and was governed by O. 72 of the ROC. Order 72 of the ROC governs the procedure for contentious probate actions whereas O. 71 deals with non-contentious probate proceedings.

[12] Order 72 r. 1(2) of the ROC states that "probate action" means "an action for the grant of probate of the will, or letters of administration of the estate, of a deceased person or for the revocation of such a grant or for a **decree pronouncing for or against the validity of an alleged will**, not being an action, which is non-contentious. For completeness it is necessary to mention that s. 2 of the Probate and Administration Act 1959 (Act 97) defines "probate action" as a cause or matter in which a **petition for probate** or administration is **contested by any person**, and includes an application to alter or revoke any grant of representation. (emphasis added)

[13] In the context of the issues raised herein, we think that it is necessary and imperative to reproduce parts of O. 71 and O. 72 of the ROC which deal with some of the procedural aspects of probate proceedings.

[14] We start with O. 71 (non-contentious probate). The process by which a propounder seeks to obtain probate in respect of a will is the filing of an originating summons. A party with an interest in the estate of the deceased is entitled to enter a probate caveat, the presence of which will prevent probate from being granted. And if a caveat is filed by a party with an opposing or contrary interest or claim (O. 71 r. 37(1) of the ROC), then the party seeking probate will issue a warning to the caveator (O. 71 r. 37(8) of the ROC). The caveator must then enter an appearance as a response to the warning.

[15] Once the caveator enters an appearance to the warning (O. 71 r. 37(10) of the ROC), then the matter which was originally non-contentious, procedurally morphs into a contentious probate proceeding (see O. 71 r. 37(14) of the ROC below) and paves the way for a probate action to be filed (per O. 71 r. 38 and O. 37 r. 39 of the ROC).

[16] The relevant rules are as follows:

> **Order 71**
>
> **Rule 37. Caveats**
>
> (1) Any person who wishes to ensure that no grant is made without notice to himself may enter a caveat.
>
> ...
>
> (8) A **caveat may be warned** by the issue from Registry of a warning in Form 165 at the instance of any person interested (who is referred to as "the person warning" in this rule) who shall state his interest and, if he claims under a will, the date of the will, and shall require the caveator to give particulars of any contrary interest which he may have in the estate of the deceased; and every warning or a copy thereof shall be served on the caveator and the Registrar of the Principal Registry.
>
> ...

A (10) A **caveator having an interest contrary to that of the person warning may**, within eight days of service of the warning upon him inclusive of the day of such service, or at any time thereafter if no affidavit has been filed under paragraph (12), **enter an appearance** in Form 166 in the Registry, and shall serve on the person warning and the Registrar of the Principal Registry a copy of it sealed with the seal of the Court.

B ...

(14) **Upon an appearance being entere**d in answer to the warning of a caveat, **the matter shall be deemed to be contested** and the expenses of entry of such caveat and the warning thereof shall be considered as costs in the cause.

C ...

Rule 38. Contested matters

(1) **Every contested matter shall be referred to a Judge who may dispose of the matter in dispute in a summary manner or direct that the**

D **provisions of O. 72 shall apply**.

(2) Where a matter is directed to be disposed of summarily the originating summons, if any, shall ordinarily be adjourned into open Court for hearing and the Court may on such adjourned hearing either grant or refuse the prayer in the originating summons or make such other order

E as may be just.

Rule 39. Notice of commencement of probate action

Upon the commencement of a probate action, the Registrar shall, in respect of each caveat then in force (other than a caveat entered by a party to the probate action) give to the caveator notice of the commencement

F of the action and, upon the subsequent entry of a caveat at any time when the action is pending, shall likewise notify the caveator of the existence of the action. (emphasis added)

[17] A probate action is commenced by writ and in this regard, O. 72 r. 2 provides as follows:

G 2. Requirements in connection with issue of writ (O. 72 r. 2)

(1) A probate action shall be begun by writ, and the writ shall be issued out of the Registry.

(2) Before a writ beginning a probate action is issued, it must be

H endorsed with a statement of the nature of the interest of the plaintiff and of the defendant in the estate of the deceased to which the action relates.

(3) A writ beginning an action for the revocation of the grant of probate of the will, or letters of administration of the estate, of a deceased person shall not be issued unless a citation under rule 7 has been

I issued or the probate or letters of administration, as the case may be, has or have been lodged in the Registry.

[18] Order 72 r. 4 of the ROC also provides for any interested party to intervene in the probate action. It reads as follows: A

Rule 4. Intervener in probate action

(1) A person not a party to a probate action may apply to the Court for leave to intervene in a probate action. B

(2) An application under this rule must be made by notice of application supported by an affidavit showing the interest of the applicant in the estate of the deceased.

(3) An applicant who obtains leave to intervene in a probate action shall not be entitled to be heard in the action unless he enters an appearance therein. C

(4) Where the Court grants leave under this rule, it may give such directions as to the service of pleadings, the filing of an affidavit of testamentary scripts or other matters as it thinks necessary.

[19] There is also a specific requirement for the filing of testamentary scripts. In this regard, O. 72 r. 9 provides as follows: D

Rule 9. Affidavit of testamentary scripts

(1) Unless the Court otherwise directs, the plaintiff and every defendant who has entered an appearance in a probate action must swear an affidavit: E

(a) describing any testamentary script of the deceased person, whose estate is the subject of the action, of which he has any knowledge or, if such be the case, stating that he knows of no such script; and

(b) if any such script of which he has knowledge is not in his possession or under his control, giving the name and address of the person in whose possession or under whose control it is or, if such be the case, stating that he does not know the name or address of that person; and any such script which is in the possession or under the control of the deponent must be annexed to his affidavit. F

(2) An affidavit required by this rule (together with any testamentary script) must be filed within fourteen days after the entry of appearance by a defendant to the action or, if no defendant enters an appearance therein and the Court does not otherwise direct, before the action is set down for trial. G

(3) Where any testamentary script required by this rule to be filed or any part thereof is written in pencil, then, unless the Court otherwise directs, a facsimile copy of that script, or of the page or pages thereof containing the part written in pencil, must also be filed and the words which appear in pencil in the original must be underlined in red ink in the copy. H

(4) Except with the leave of the Court, a party to a probate action shall not be allowed to inspect an affidavit filed under this rule by any other party to the action, or any testamentary script annexed thereto, unless and until an affidavit sworn by him containing the information referred to in paragraph (1) has been filed. I

A (5) In this rule, "testamentary script" means a will or draft thereof, written instructions for a will made by or at the request or under the instructions of the testator and any document purporting to be evidence of the contents, or to be a copy, of a will which is alleged to have been lost or destroyed.

B **[20]** Now, in the event of default of appearance, O. 72 r. 10 of the ROC provides that O. 13 shall not apply to a probate action and that if there is default in appearance by the defendant, then after the time limited for appearance, (per O. 72 r. 10(2) of the ROC) the plaintiffs shall proceed with the action as if the defendant had entered an appearance. And significantly, per O. 72 r. 10(3), the plaintiffs may after the time limited for appearance C by the defendant apply for leave to set down the action for trial. The following parts of O. 72 of the ROC are also significant in the present context and may they read as follows:

Rule 11. Service of statement of claim

D The plaintiff in a probate action must, unless the Court gives leave to the contrary or a statement of claim is endorsed on the writ, serve a statement of claim on every defendant who enters an appearance in the action and must do so before the expiration of six weeks after entry of appearance by that defendant or of fourteen days after the filing by him of an affidavit under r. 9, whichever is the later.

E

Rule 12. Counterclaim

Notwithstanding anything in O. 15 r. 2(1), a defendant to a probate action who alleges that he has any claim or is entitled to any relief or remedy in respect of any matter relating to the grant of probate of the will, or F letters of administration of the estate, of the deceased person which is the subject of the action shall add to his defence a counterclaim in respect of that matter.

Rule 13. Contents of pleadings

(1) Where the plaintiff in a probate action disputes the interest of a G defendant he must allege in his statement of claim that he denies the interest of that defendant.

(2) In a probate action in which the interest by virtue of which a party claims to be entitled to a grant of letters of administration is disputed, the party disputing that interest must show in his pleading that if the H allegations made therein are proved he would be entitled to an interest in the estate.

(3) Without prejudice to O. 18 r. 7, any party who pleads that at the time when a will, the subject of the action, was alleged to have been executed the testator did not know and approve of its contents must specify the nature of the case on which he intends to rely, and no allegation in I support of that plea which would be relevant in support of any of the following other pleas:

(a) that the will was not duly executed;

(b) that at the time of the execution of the will the testator was not of sound mind, memory and understanding; and

(c) that the execution of the will was obtained by undue influence or fraud,

shall be made by that party unless that other plea is also pleaded.

Rule 14. Default of pleadings

(1) Order 19 shall not apply in relation to a probate action.

(2) Where any party to a probate action fails to serve on any other party a pleading which he is required by these rules to serve on that other party, then, unless the Court orders the action to be discontinued, that other party may, after the expiration of the period fixed by or under these rules for service of the pleading in question, apply to the Court for leave to set down the action for trial.

[21] Having traced the procedural rules pertaining to contentious and non-contentious probate proceedings, we shall now come back to the mainstream of this appeal. In terms of chronology, it is necessary to mention that the defendant and plaintiffs filed their respective probate caveats predicated on the 2005 will and 2018 will respectively. As mentioned earlier, the deceased died on 23 June 2019. Following the death of the deceased, the plaintiffs filed an Originating Summons No. JA-32NCvC-371-07-2019 ("OS 371") in the Johor Bahru High Court to obtain a grant of probate of the 2018 will. However, the grant of probate which had been obtained OS371 could not be sealed because of caveat 1824.

[22] Consequently, the plaintiffs filed Suit 149 on 17 September 2019, for a declaration that the 2018 will is valid and the 2005 will is null and void. The defendant in his defence and counterclaim contended that the 2005 will was valid and continued to subsist.

[23] In essence, the defendant contended *via* his defence and counterclaim and per his affidavits filed in opposition to the summary judgment application, that the 2018 will is null and void and invalid as, (a) the deceased had suffered a stroke and was incapable of giving the necessary instructions and accordingly lacked the requisite testamentary capacity, (b) there were suspicious circumstances surrounding the making of the 2018 will, (c) the 2018 will was obtained through undue influence exerted by the respondents.

[24] In his defence and counterclaim, the defendant prayed for the following orders;

(i) that the probate obtained by the plaintiffs *vide* OS 371 on 19 August 2019 be set-aside, is invalid and unenforceable.

A (ii) a declaration that the 2018 will is invalid and unenforceable and the 2005 will is valid and enforceable.

The Property

[25] We turn now to the dispute over a parcel of land which was the subject B matter of the 2018 will. A major point in contention in Suit 149 is a parcel of land held under GM 112 Lot 2838 in the Mukim of Kulai, District of Kulaijaya, State of Johor together with the building existing on the land or to be erected on the land ("the property"). Under the 2018 will, the deceased purported to bequeath to the plaintiffs jointly and equally, all his legal and C beneficial rights, interests profits and benefits in the whole share of the property.

[26] The deceased had previously lodged a lienholder's caveat over the property *via* Perserahan No. 85/2015. The 2018 will states that "the original title shall be kept by my beneficiaries and a lienholder's caveat lodged over D the property".

[27] In so far as the property is concerned, the defendant contended that the deceased was only a "bare trustee" and could not lawfully bequeath the property or any interest therein. The defendant contends that the deceased had no legal right to enter alien-holder's caveat. The defendant relied upon E the following passage from the judgment of Wong Kian Kheong J in *KTL Sdn Bhd & Anor v. Leong Oow Lai & Other Cases* [2014] 1 LNS 427; [2014] MLJU 1405 (HC) where the learned judge made reference to ss. 2 and 3 of the Wills Act 1959 ("WA") and said, "It is clear from the definition of "will" in s. 2(1) of the WA and s. 3 of the WA (regarding property which F can be transmitted by a will), the purpose of a will is for a testator to transmit his or her own legal and equitable assets. A testator cannot declare in his or her will that the testator holds property in trust for another person."

[28] The history and how the property came into the hands of the defendant's family through their father, Lee Choo @ Lee Chau is narrated G in the following paragraphs of the defence and counterclaim:

> 6. Hartanah tersebut pada asalnya telah *digadai kepada ayah Defendan, Lee Choo @ Lee Chau melalui pinjaman wang yang diberikan oleh ayah Defendan, Lee Choo @ Lee Chau kepada pemilik berdaftar Hartanah tersebut yang dikenali sebagai Warjo bin Kajam. Sebagai balasan kepada suatu pinjaman wang tersebut,* H *pemilik berdaftar Hartanah tersebut telah menyerahkan hakmilik asal Hartanah tersebut kepada ayah Defendan, Lee Choo @ Lee Chau sebagai jaminan kepada suatu pinjaman wang tersebut yang mana sekiranya bayaran balik gagal dibuat*, Hartanah tersebut harus didaftarkan kepada nama ayah Defendan, Lee Choo @ Lee Chau. Kegagalan Warjo bin Kajam dalam membayar kembali pinjaman wang tersebut mengakibatkan Hartanah tersebut harus I dipindahmilik kepada ayah Defendan, Lee Choo @ Lee Chau. Namun, ayah Defendan, Lee Choo @ Lee Chau kini juga telah lama meninggal dunia.

7. Oleh itu, si mati hanyalah pemegang amanah "bare trustee" semata-mata kepada Hartanah tersebut atas sebab berikut:

(a) *Bapa Defendan, Lee Choo @ Lee Chau yang telah memberikan balasan kepada pemilik berdaftar Hartanah tersebut dengan pertukaran Geran dan bukanlah si mati*;

(b) *Si mati hanya secara unilateral memasuki kaveat lien pada tahun 2015 dan tidak pernah memberi sebarang balasan kepada pemilik berdaftar Hartanah tersebut*;

(c) Hartanah tersebut bukanlah pada bila-bila masa yang material milik si mati;

(d) Si mati hanyalah bertindak sebagai semata-mata pemegang amanah "bare trustee" terhadap Hartanah tersebut untuk dipindahmilik kepada Defendan dan/atau waris-waris yang berhak selaku waris sah ayah Defendan, Lee Choo @ Lee Chau yang telah meninggal dunia;

(e) Si mati harus, namun telah gagal, untuk melakukan proses pendaftaran hakmilik Hartanah tersebut kepada Defendan; dan

(f) Si mati tidak berhak untuk menjual dan/atau memindahmilik sebarang kepentingan Hartanah tersebut kepada pihak ketiga dan/atau Plaintif-Plaintif.

8. Selanjutya dan atas sebab persetujuan tersebut itu juga, 4 wasiat telah disediakan oleh firma guaman Derek K.T. Tham & Co, dan ditandatangani secara serentak oleh si mati dengan Defendan dan adik beradik yang lain bertujuan memastikan Hartanah tersebut sentiasa dipelihara, dipindahmilik dan diwarisi oleh Defendan adik beradik.

9. Hartanah tersebut juga telah dibangunkan serta dijaga oleh Defendan bersama-sama adik beradik yang lain dengan segala kos dan masa yang telah banyak dilaburkan sejak sekian lama. Hartanah tersebut pada asalnya hanyalah kawasan tanah rendah yang dipenuhi hutan. Kini Hartanah tersebut digunakan oleh Defendan bersama-sama adik beradik yang lain sebagai tempat tinggal dan tanaman. (emphasis added)

[29] However, the plaintiffs' response (per their reply and defence to counterclaim) was different. According to the plaintiffs, it was the deceased who gave the loan to Warjo bin Kajam the registered owner of the property. The relevant paragraphs in the reply and defence to counterclaim read as follows:

4. Plaintif-Plaintif menafikan perenggan 5 Pernyataan Pembelaan dan meletakkan Defendan di atas beban bukti yang kukuh. Plaintif-Plaintif menegaskan dan akan menegaskan bahawa Geran Mukim 112 Lot 2838 Mukim Kulai ("Hartanah Tersebut") bukan milik si mati ataupun keluarga si mati ataupun Defendan.

5. Plaintif-Plaintif menafikan perenggan-perenggan 6, 7, 8 dan 9 Pernyataan Pembelaan dan meletakkan Defendan di atas beban bukti yang kukuh. Plaintif-Plaintif menegaskan dan akan menegaskan bahawa

A **si mati telah memberi pinjaman kepada Warjo bin Kajam iaitu pemilik berdaftar Hartanah Tersebut dan bukan ayah si mati**. Hartanah tersebut tetap dimiliki oleh Warjo Bin Kajam dan si mati hanya menuntut satu lien ke atasnya kerana pemilik telah mendepositkan suratan hakmilik bersama si mati sebagai sekuriti dan bukan dengan Defendan untuk pinjaman yang telah diberi. Suratan hakmilik itu kini di dalam pegangan Plaintif-Plaintif.
B (emphasis added)

[30] On 13 November 2019, the plaintiffs filed encl. 7 for summary judgment to be entered against the defendant. The defendant argued that the summary judgment procedure under O. 14 of the ROC was not applicable to probate actions. The JC disagreed with the defendant's arguments regarding
C the applicability of the summary judgment process under O. 14 r. 1 of the ROC to probate actions. The JC agreed with the plaintiffs and ruled that probate actions were not excluded from the ambit of O. 14 of the ROC.

[31] The JC dealt with Suit 149 as one which fell to be considered based
D on the principles as would be ordinarily applicable in a summary judgment application and concluded that the grounds which were relied upon by the defendant were based on bare statements, unsupported by evidence and were baseless. Thus, the JC ruled in favour of the respondents and allowed the application and judgment was entered against the defendant on 23 September 2020. The following orders were made:
E

(i) that the last will and testament of the late Mr Lee Poi Sam is the 2018 will and that the 2005 will be revoked;

(ii) that caveat 1824 be cancelled;

F (iii) that the grant of probate be issued to the plaintiffs; and

(iv) costs of RM4,000

The High Court's Grounds Of Judgment

[32] The JC's grounds of judgment are reported as *Wasunan Tonrab & Anor*
G *vs. Lee Ah Sin* [2020] 1 LNS 2265; [2020] MLJU 2398, [2021] 9 MLJ 838, (HC). The JC's findings are as follows:

> Findings By The Court
>
> [18] The defendant raised a number of issues in his submission to challenge the validity of the 2018 will.
>
> H In order to determine the validity of the 2018 will, the plaintiffs need to prove that the said will has complied with the formal requirements of the Wills Act 1959 (the Act).
>
> Section 5 of the Act states that "No will shall be valid unless it is in writing and executed in manner hereinafter mentioned."
>
> I

Section 5(2) of the Act then provides:

> Every will shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction; such signature shall be made or acknowledged by the testator as the signature to his will in the presence of two or more witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary ...

[19] In the present case, the deceased signed the 2018 will at the bottom end. He signed it in the presence of 2 witnesses who have both subscribed the will in the presence of the testator.

Both witnesses are advocates & solicitors and each has respectively affirmed an affidavit confirming that the deceased signed the will in their presence and they subscribed the will in the deceased's presence. (Exhibit P-1 of Encl. 8 at page 11). Therefore, it is clear that the 2018 will has fully complied with the provisions of the Wills Act 1959 and is *prima facie* a valid will.

[20] The plaintiffs having established that the 2018 will is valid, it now falls on the defendant to prove on a balance of probabilities that the said will is invalid as he has alleged in his Statement of defence. His main contention is that the deceased lacked testamentary capacity and was subject to undue influence by the plaintiffs. It is a settled law of evidence that he who alleges must prove his allegations. I have perused in detail, the defendant's Affidavit in Reply and I find that the allegations that the deceased lack testamentary capacity is just a bare allegation totally unsupported by any evidence. The relevant paragraph of the defendant's affidavit merely states that the deceased's age (71 years old) and the frequent visitation to hospitals. The deceased was alleged to have suffered a stroke. The defendant made numerous other general allegations without any supportive evidence to prove the deceased's lack of mental capacity to make the 2018 will.

[21] The defendant claims that the deceased lived with him for some time and yet he failed to produce any medical report to show that the deceased suffered from any of the medical conditions as alleged. Such report could have been obtained earlier from the hospitals which had treated the deceased.

[22] In contrast, the plaintiffs have produced the affidavit and Statutory Declaration by the 2 solicitors who attended to the 2016 and 2018 wills, who claimed under oath that the deceased was fully aware of what he was doing at that point of time. They had given detailed reports of how he came to their respective offices and gave detailed instructions on how the 2 wills were to be drafted. After giving due consideration to the Affidavit in Support by the plaintiffs and the defendant's Affidavit in Reply, I find on a balance of probabilities that the deceased had full capacity to make both the 2016 and 2018 wills. I find that the allegations by the defendant is pure conjecture and full of unsupported assumptions. Therefore, the defendant had failed to prove the deceased's alleged lack of testamentary capacity.

A [23] The defendant also alleged that the deceased was under undue influence by the plaintiffs when he made the 2018 will, but again failed to adduce any evidence in his affidavit to support such allegations. The defendant merely attempted to draw an inference from the circumstances surrounding the deceased's making of the 2018 will to suggest he was under the "undue influence" by the plaintiffs.

B The basis of such allegations includes;

(i) the deceased was a stroke patient, and hence easily influenced,

(ii) the plaintiffs being based in Thailand and rarely visited the deceased,

C (iii) plaintiffs did not take good care of the deceased's welfare and other allegations in paragraphs 36 and 37 of defendant's submission, including the alleged suspicious circumstances just because the deceased used new lawyers instead of his former lawyer to make the 2016 and 2018 wills.

D [24] The meaning of undue influence in probate actions was explained by the learned judge in *Wingrove v. Wingrove* [1885] 11 P.D, page 81.

> To be undue influence in the eye of the law there must be – to sum it in a word – coercion. It must not be a case in which a person has been induced by means such as I have suggested to you to
E come to a conclusion that he or she will make a will in a particular person's favour, because if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a
F testator is coerced into doing that which he or she does not desire to do, that it is undue influence.
>
> It is clear from the speech by the learned Judge that the crucial element in any act of undue influence on a testator is "coercion".
>
> In the present case, nowhere in his Affidavit in Reply does the
G defendant even allege any coercion by the plaintiffs on the deceased.
>
> It has been held by the House of Lords in *Boyse v. Rossborough* [1857] 6 HLC 2 that:
>
> the burden of proving that it was executed under undue influence
H is on the party who alleges it. Undue influence cannot be pressured. This basic principle was reiterated in the Privy Council case of *Craig v. Lamoureux* [1920] AC 349.
>
> Having perused the Affidavit in Reply and submissions by the defendant, I find that he has failed to prove that the deceased was
I under any undue influence when he made both the 2016 and 2018 wills.

[25] The other allegation by the defendant concerns the ownership of the land. That is totally irrelevant to the issue of the validity of the 2018 will. The deceased was only a lien-holder of the land and never claimed ownership. In any event, the land is registered under the name of a third party. Any claim the defendant may have on the said land, should be pursued *via* an action against the registered owner, who incidentally is not a party to this action.

[26] The defendant submitted that a contested Probate matter should go for full trial and O. 14 application is not applicable for such matters.

Order 14(r)(2) states:

Subject to paragraph (3) this rule applies to every action begun by writ other than:

(a) a claim by the plaintiff for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage; or

(b) a claim by the plaintiff based on an allegation of fraud.

This claim does not invoke any of the excluded claims referred to in (a) and (b) above. Thus, this case does not fall within the exceptions in r. 2 and can be decided summarily.

[27] Richard Malanjum JCA (later CJ) in *Abdol Mulok Awang Damit v. Perdana Industri Holdings Bhd* [2003] 3 CLJ 497 held:

> It was the contention of learned counsel for the appellant that since it was only an O. 14 application all that was required of the appellant was to raise triable issues and that he should not be expected to come up with proofs as ruled by the learned judge in the court below. With respect such a submission is not entirely consistent with our current judicial trend. Bare assertion does not necessarily amount to a triable issue thereby compelling a case to go for a full trial. It may still be subject to curial scrutiny for its value. Indeed in *Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 His Lordship Mohd. Azmi FCJ gave a clear guide on the approach to be adopted ...

[28] In this case, the defendant has only made bare allegations and has failed to produce any evidence to support his allegations. The evidence given by the 3 independent lawyers whom the deceased appointed himself and the fact that he was unaccompanied when he went to execute the 2016 and 2018 wills respectively have not been discredited by the defendant.

The plaintiffs should not be put to the cost and expense of a trial just because the defendant made bare allegations and assertions that the deceased lacked testamentary capacity or was subjected to undue influence. There is also no evidence in this case to suggest any suspicious circumstances whatsoever.

A

Our Decision

[33] The appropriate starting point is the law in regard to the burden of proof in probate matters. This is a very crucial and critical aspect of probate litigation in that the probate judge must be clear as to where the burden of proof lay on a particular issue. The most relevant rule in this regard is the
B rule which imposes on the party propounding the impugned will, the burden of proving that it was truly the last testamentary disposition of the deceased testator.

[34] In this regard, in *Pendock Barry v. James Butlin* (1838) 2 Moore 480; [1838] UKPC 22 (PC) ("*Barry v. Butlin*"), Mr Baron Parke said, at p. 482,
C "the *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator".

[35] It is clear that the plaintiffs are the protagonist of the probate action
D and they are the propounders of the 2018 will. Hence, the burden of proof in regard to the validity of the 2018 will rested on the plaintiffs who had the initial burden of proving that the deceased had the requisite testamentary capacity and that there was due execution of the 2018 will, *ie*, that the 2018 will was executed in accordance with the Wills Act 1959. In this regard, as
E the propounders of the 2018 will, the plaintiffs also had the burden of dispelling any suspicious circumstances. The rule regarding the initial burden of proof is peculiar to probate litigation. The role of the court in probate litigation is also quite extraordinary. Thus, in contentious probate proceedings in which the alleged last will and testament of a deceased testator is challenged due to lack of testamentary capacity, undue influence, forgery
F or the presence of suspicious circumstances in regard to the making or execution of the alleged will, the legal proceedings are not entirely adversarial. Rather, it would be quite accurate to describe contested probate proceedings as "investigative" or "quasi-inquisitorial". This obviously calls for some explanation.

G **[36]** No doubt, the rival contestants in the probate proceedings namely the propounder of the impugned will and those who are challenging the validity or authenticity of the will are adversaries. But ultimately the question whether an impugned testamentary disposition is to be upheld or not will depend on whether the "judicial conscience" of the court has been satisfied.

H **[37]** The test of satisfying the court's judicial conscience merely emphasises that, in determining the question as to whether a testamentary instrument produced before the court is the last will of the deceased testator, the court is called upon to decide a solemn question and it must be fully satisfied that
I it had been validly executed by the testator who is no longer alive and not able to testify whether the impugned will truly carries the testator's signature or thumbprint (as the case may be) and truly reflects the testator's wishes as to the distribution of the assets of the estate.

[38] The principle in this regard was lucidly and comprehensively explained by Justice Gajendragadkar in the decision of the Indian Supreme Court in *H Venkatachala Iyengar v. BN Thimmajamma & Others* 1959 AIR 443, 1959 SCR Supl (1) 426 (SC) where the learned jurist said:

> What is the true legal position in the matter of proof of wills? It is well-known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents.
>
> Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under s. 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under ss. 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution.
>
> These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, ss. 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills.
>
> It would *prima facie* be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by s. 63 of the Indian Succession Act.
>
> As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the, prudent mind in such matters.

A However, there is one important feature which distinguishes wills from other documents. *Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of* B *the departed testator*. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents.

The *propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions* C *and put his signature to the document of his own free will*. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts D just indicated.

There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature, in question is the signature of the testator may not remove E the doubt created by the appearance of the signature; *the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind*. F In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator.

The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to G *treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter*. Apart H from the suspicious circumstances to which we have just referred, in some cases the wills propounded disclose another infirmity.

Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as I a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and

satisfactory evidence. *It is in connection with wills that present such suspicious circumstances that decisions of English courts often mention the test of the satisfaction of judicial conscience*. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word 'conscience' in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasises that, in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive.

It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the court by cogent and satisfactory evidence.

It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. It is quite true that, as observed by Lord Du Parcq in *Harmes v. Hinkson* (1) "where a will is charged with suspicion, the rules enjoin a reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity.

He is never required to close his mind to the truth". It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect.

[39] Thus, unlike other litigation, in probate actions the role of the probate court is both supervisory and investigative. Mr Justice Henderson in *Cushway v. Harris* [2012] EWHC 2273 (Ch) at para. 8, commented, "the court always has a supervisory, and to some extent, investigatory, jurisdiction in probate matters".

[40] We turn now to the issue of testamentary capacity. In this regard, testamentary capacity, or the lack of it would seem to be the most common issue in dispute in probate litigation. The relevant test for testamentary capacity remains that set out by the Chief Justice, Sir Alexander Cockburn, speaking for the court of Queen's Bench in *Banks v. Goodfellow* 39 LJQB 237, [1861-73] All ER Rep 47, 22 LT 813, (1870) LR 5 QB 549 at 565, where he said:

A

> It is essential to the exercise of such a power that a testator shall *understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing*; shall be *able to comprehend and appreciate the claims to which he ought to give effect*; and, with a view to the latter object, that *no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties* – that *no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made*. (emphasis added)

B

[41] In *Hawes v. Burgess* [2013] EWCA Civ 94, Mummery LJ at para. 14:

> ... The freedom of testation allowed by English law reads that people could make a valid will, even if they are old or infirm or in receipt of help from those who they wish to benefit, and even if the terms of the will are hurtful, are grateful or unfair to those whose legitimate expectations of testamentary benefit or disappointed.
>
> The basic legal requirements for validity are that *people are mentally capable of understanding what they are doing when they make their will and that what is in the will truly reflects what they freely wish to be done with their estates on their death*. (emphasis added)

C

D

[42] In *Chin Jhin Thien & Anor v. Chin Huat Yean & Anor* [2020] 7 CLJ 137; [2020] MLJU 906, [2020] 4 MLJ 581 (FC) ("*Chin Jhin Thien*") the Federal Court compendiously examined the relevant case laws concerning, amongst others, the principles which are applicable to the question of a testator's testamentary capacity.

E

[43] The Federal Court opined that it was sufficient if, at the time he executed the will, the testator had sufficient mental ability to understand that he was making a will, the effect of making the will and the general nature and extent of his property. The Federal Court distilled the principles that were established in *Tho Yow Pew & Anor v. Chua Kooi Hean* [2002] 4 CLJ 90; [2002] 4 MLJ 97 (FC) per Gopal Sri Ram JCA (as he then was) where it was stated that "very slight testamentary capacity is required for the making of a will. The cases in which wills have been held invalid for lack of testamentary capacity involve testators who were utterly insane either upon the finding of the probate court or by reason of an order appointing a committee on the ground of insanity of the testator".

F

G

[44] The Federal Court also endorsed the view that "testamentary capacity cannot be equated with contractual capacity". (See: Gopal Sri Ram JCA (as he then was) in *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97 (CA)). In *Chin Jhin Thien* the Federal Court reiterated the well-known rules in probate law:

H

> ... first, that the onus probandi lies in every case upon the party propounding a will and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator.

I

The second is, that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite suspicion of the court, and call upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.

Those who propound a will must show that the will of which probate is sought is the will of the testator, and that the testator was a person of testamentary capacity. In ordinary cases, if there is no suggestion to the contrary, any man who is shown to have executed a will in ordinary form will be presumed to have testamentary capacity, **but the moment the capacity is called in question, then at once the onus lies on those propounding the will to affirm positively the testamentary capacity**. Moreover, if a will is only proved in common and not in solemn form, the same rule applies even though the action is to attack a probate which has been granted long ago.

A propounder of the will has to **prove its due and valid execution and if there are any suspicious circumstances he must remove them from the mind of the court**. (emphasis added)

[45] In *Chin Jhin Thien* the Federal Court also took the opportunity to endorse the legal principles that were succinctly summarised by Varghese George JC (as he then was) in *Choo Mooi Kooi v. Choo Choon Jin & Other Cases* [2012] 3 CLJ 477; [2012] 2 MLJ 691 (HC) which were stated in the following terms:

(a) where the validity of a will is challenged, *the testamentary capacity of the testator must be first established*;

(b) the *burden of proving*:

(1) *testamentary capacity*, and

(2) due execution was on the propounder of the will, as was also the burden of

(3) *dispelling any suspicious circumstances that surrounded the making of the will*.

(c) *there must be evidence that the contents of the will had been read over to the deceased and the deceased understood the dispositions being made*;

(d) the onus then shifted to the party challenging the validity of the will to establish to the satisfaction of the court on *relevant and cogent evidence the existence of any vitiating circumstances*;

(e) *mere suspicions or conjectures are not ordinarily sufficient to dispense the validity of the signature or the contents of the will*;

(f) the court will not concern itself with the fairness of the disposition in the will once satisfied that the testator understood the dispositions being made and the will in question was duly executed;

A (g) *whether the execution of the impugned will was a result of 'testamentary incapacity' (ie, not of good health, sound mind, memory and understanding) was a specific finding of fact to be made on the totality of the evidence led before the court*;

(h) the burden of proof often shifts about in the process of the cause according to the successive steps of the inquiry, before leading to the B decisive inferences to be made ... *The propounder of the will still had the ultimate burden of dispelling any suspicious circumstances that may have surrounded the making of the will*;

(i) the elements or ingredients to be established on evidence to successfully uphold the consideration of 'natural love and affection' as valid, included evidence of some spontaneous happening in the normal C course of a relationship predicated by birth (natural) or a fondness or affection of mind (love) together with a measure of personal attachment or feeling for the other;

(j) a duly executed MOT could still be invalidated and any transfer thereby registered could be set aside under s. 340(2)(b) of the National D Land Code 1965 as having been obtained through a 'void or insufficient instrument', where it can on facts be shown that there was not exuberated any 'natural love and affection' as between the transferor and the transferee;

(k) the *jurisdiction of the court to grant relief on an allegation that there was indeed* E *'undue influence' exerted, is as wide and as flexible as the exigency of the case demand. The court could hold that there was undue influence even without direct proof of any dominance over the will of a party to a transaction* ...

(l) *even where undue influence may not have been definitely established on evidence, the court could still strike down a will or instrument that had been challenged on* F *that count, under the inherent duty of the court to be vigilant against suspicious circumstances which could go to the root of the validity of any document before the court.*

(emphasis added)

[46] In so far as the question of testamentary capacity is concerned, the G critical moment in terms of ascertaining the condition of the deceased is when he allegedly executed the 2018 will. The condition of the deceased at any other time is quite irrelevant. The legal position in this regard was lucidly elucidated by Ravinthran JC (as he then was) in *Randolph Yap Pow Kong & Anor v. Yvonne Yap Yoke Sum & Ors* [2010] 1 LNS 684; [2011] 3 MLJ 556 (HC) ("*Randolph Yap*'s" case). In *Randolph Yap*'s case the H facts (per MLJ synopsis) were as follows. The plaintiffs filed the action to invalidate a will and a power of attorney purportedly executed by Mr YY Lee (the deceased') on 18 January 2005. The plaintiffs were the two sons of the deceased from his first marriage. The first, second and fourth defendants were his children from his second marriage with the third defendant. The I plaintiffs did not receive any bequests under the said will of the deceased. The sole beneficiary of the will was his widow, the third defendant.

[47] As for the power of attorney, the donees were the first and second defendant. They transferred two properties to themselves upon the purported instructions of the deceased. The deceased fell ill in 2003 and was hospitalised. That was the time he was diagnosed with Parkinson disease and mild dementia. He was also reported by the attending neurologist to have suffered hallucination and delusion as a result of adverse reaction to medication in 2004. He recovered when another drug to counter the side effect was given. He died in July of 2006, presumably from the progression of his illness. The plaintiffs' case was that the deceased lacked testamentary capacity, that he was subjected to the influence of the defendants and that the will was a forgery.

[48] Counsel for the plaintiffs also submitted the deceased was wheel- chair bound and depended completely upon the second defendant for his everyday needs. The argument was that the second defendant exerted undue influence on the deceased. At para. [11] of the judgment, the learned judge in *Randolph Yap*'s case explained the rationale for the requirement in regard to the testamentary capacity of the testator at the time when the impugned will was executed. This is how that learned judge put it:

> Testamentary Capacity
>
> Relevant time
>
> The **relevant point of time to determine testamentary capacity is the time when the testator signs the will**. He may have been lacking such capacity prior to the signing of the will or after signing the will but that is irrelevant for purpose of determining the validity of the will. In this case, there is evidence that the deceased fell ill in 2003 and was hospitalised. That was the time he was diagnosed with Parkinson disease and mild dementia. He was also reported by the attending neurologist to have suffered hallucination and delusion as a result of adverse reaction to medication in 2004. He recovered when another drug to counter the side effect was given. He died in July of 2006, presumably from the progression of his illness. However, **the point of time that is crucial to the determination of the issue whether he possessed a sound disposing mind is 18 January 2005, *ie* the date the will and power of attorney were signed**.
>
> (emphasis added)

[49] In the same case, the learned judge opined that, "whether the deceased possessed a sound disposing mind at the time of execution of the will is a question of fact to be determined upon the evidence of the witnesses." The last point that is to be observed from the factual matrix of *Randolph Yap*'s case is the judge's finding in regard to the drafting of the impugned will by an advocate and solicitor and the presence of a doctor who examined the testator and was satisfied that the testator was mentally alert. In para. (5) of the judgment the judge said:

> [5] The doctor who examined the deceased before he signed the will was Dr Tok. She checked the vital signs of the deceased when she arrived at the house. She had a short conversation with the deceased. She had no

A problem communicating with him and had no reason to suspect that he was suffering from mental disorder. She, therefore, did not conduct a neurologic examination. She certified that he was mentally alert and sound during the signing of the will and the power of attorney.

[50] In our view, having regard to all the circumstances attendant upon the B making and execution of the purported will, we find that the JC misdirected himself in ruling that O. 14 r. 1 ROC is applicable to probate actions and in relying upon affidavits and reaching the conclusion that the 2018 will was valid and that the plaintiffs, as the propounders of the 2018 had proven that the deceased had testamentary capacity at the time when the 2018 will was C allegedly executed.

[51] Quite clearly the determination of the issue as regards validity of the 2018 will pivots on a finding of fact based on evidence of witnesses and the relevant documentary evidence. This would necessarily include the evidence of medical experts and that of the defendant and his brothers touching upon D the several matters referred to in the defence and counterclaim including the understanding or agreement between the siblings *inter alia* in regard to the property.

[52] The JC seems convinced that the deceased signed the 2018 will at the bottom end and that he signed it in the presence of two witnesses who have E both subscribed the 2018 will in the presence of the deceased. The JC was very much impressed with the fact the deponents are advocates & solicitors and each have respectively affirmed an affidavit confirming that the deceased signed the 2018 will in their presence and they subscribed the 2018 will in the deceased's presence. The JC therefore concluded that the 2018 will had F fully complied with the provisions of the Wills Act 1959 and is *prima facie* a valid will. The JC went on to hold that the defendant's allegation that the deceased lack testamentary capacity is just a bare allegation totally unsupported by any evidence.

[53] The JC said that the defendant claimed that the deceased lived with G him for some time and yet he failed to produce any medical report to show that the deceased suffered from any of the medical conditions as alleged.

[54] The learned JC found on a balance of probabilities that the deceased had full capacity to make both the 2016 will and 2018 will and that the allegation by the defendant is pure conjecture and full of unsupported H assumptions. Therefore, the defendant had failed to prove the deceased's alleged lack of testamentary capacity.

[55] The JC also concluded that the defendant's allegation that the deceased was under undue influence by the plaintiffs when he made the 2018 will was I baseless as he failed to adduce any evidence in his affidavit to support such allegations. The JC remarked that the defendant merely attempted to draw an inference from the circumstances surrounding the deceased's making of

the 2018 will to suggest he was under the "undue influence" by the plaintiffs. The JC found that the defendant has failed to prove that the deceased was under any undue influence when he made both the 2016 will and 2018 wills.

[56] Turning to the issue of ownership of the property, the JC opined that this was totally irrelevant to the issue of the validity of the 2018 will. The JC observed that the property was registered under the name of a third party and that any claim the defendant may have on the property, should be pursued *via* an action against the registered owner, who was not a party to the probate action.

[57] But, in our view, the JC overlooked s. 3 of the Wills Act 2959 (Revised 1988) Act 346 which reads as follows:

> 3. Except as hereinafter provided, every person of sound mind may devise, bequeath or dispose of by his will, executed in manner hereinafter required, all property which he owns or to which he is entitled either at law or in equity at the time of his death notwithstanding that he may have become entitled to the same subsequently to the execution of the will.

[58] It is relevant to note that counsel for the plaintiffs had informed the JC that the only questions for the court were:

(i) whether the 2018 will satisfied the formal requirements of the Wills Act 1959?

(ii) whether the deceased lacked testamentary capacity to make the 2018 will?

(iii) whether the appellant had proved the 2018 will was the result of undue influence, or produced any evidence in support of the allegation?

(iv) whether the 2005 will had been revoked?

[59] In this regard, the plaintiffs' counsel submitted:

> In the present case, the appellant has not alleged that the deceased was utterly insane or suffered from an insane delusion at the time he made or gave instructions for making the 2018 will.
>
> Quite apart from the fact that the appellant has not alleged the deceased was mentally ill, the evidence of the 2 solicitors who respectively prepared the 2016 will and the 2018 will show that the deceased was not insane.
>
> The solicitor who prepared the 2016 will confirmed in her statutory declaration that the deceased went to her law firm in April 2016 and instructed her to prepare a will to leave his entire estate to his daughter, the 1st respondent. She confirmed that the deceased was sharp and he gave clear instructions. She also confirmed that the deceased furnished her with relevant documents to prepare the will and paid the legal fee. The deceased returned to the law firm on 27.4.2016 to execute the 2016 will. The solicitor also confirmed that the deceased was alone and was not accompanied by anyone else.

A The solicitor who prepared the 2018 will in her affidavit confirmed that the deceased came to her law firm with his daughter, the 1st respondent. The deceased gave a copy of the 2016 will to the solicitor and instructed a will be prepared on the same terms save that another daughter, the 2nd respondent, be added as a co-executrix and additional beneficiary. The deceased also gave other instructions to his solicitor and furnished her B with the relevant documents to prepare the 2018 will. The solicitor also confirmed that the deceased returned to the law firm alone on 17.7.2018 to sign the 2018 will, which was witnessed by 2 solicitors from that firm.

The other solicitor from the firm who subscribed the 2018 will also affirmed an affidavit to confirm that the deceased signed the 2018 will in C his presence.

The appellant did not challenge in any way the evidence of the 3 independent solicitors. The account given by the 2 solicitors who took instructions from the deceased to prepare the 2016 will and 2018 will establish that the deceased was not insane. He attended to the signing D to the 2016 will and 2018 will alone and he gave clear instructions to his solicitors.

As such, the appellant's contention that the deceased lacked testamentary capacity is baseless. It is our respectful submission that the High Court on this issue rightly held:

E > I have perused in detail, the defendant's Affidavit in Reply and I find that the allegations that the deceased lack testamentary capacity is just a bare allegation totally unsupported by any evidence. The relevant paragraph of the defendant's affidavit merely states that the deceased's age (71 years old) and the frequent visitation to hospitals. The deceased was alleged to have F > suffered a stroke. The defendant made numerous other general allegations without any supportive evidence to prove the deceased's lack of mental capacity to make the 2018 will.?
>
> The defendant claims that the deceased lived with him for some time and yet he failed to produce any medical report to show that G > the deceased suffered from any of the medical conditions as alleged. Such report could have been obtained earlier from the hospitals which had treated the deceased.
>
> In contrast, the plaintiffs have produced the affidavit and Statutory Declaration by the 2 solicitors who attended to the 2016 and 2018 wills, who claimed under oath that the deceased was fully aware H > of what he was doing at that point of time. They had given detailed reports of how he came to their respective offices and gave detailed instructions on how the 2 wills were to be drafted.
>
> After giving due consideration to the Affidavit in Support by the plaintiffs and the defendant's Affidavit in Reply, I find on a I > balance of probabilities that the deceased had full capacity to make both the 2016 and 2018 wills. I find that the allegations by the

defendant is pure conjecture and full of unsupported assumptions. Therefore, the defendant had failed to prove the deceased's alleged lack of testamentary capacity.

[60] We may reiterate that the test for testamentary capacity per the seminal case of *Banks v. Goodfellow* is that the testator:

(i) must appreciate the nature and consequences of making a will;

(ii) must understand the extent of his or her property;

(iii) should consider any moral claims to their estate; and

(iv) must not be affected by any disorder of mind or insane delusion.

[61] Thus the main issues in this appeal are whether the summary judgment procedure which is applicable to writ action (save for the "excluded matters" per O. 14 r. 1(2) of the ROC) applies to a probate action which falls under O. 72 of the ROC. The next question is if O. 14 of the ROC applies, whether on the facts, the JC was correct to have allowed summary judgment and granted Probate based on the 2018 will.

[62] On the first issue, it is our view that O. 14 of the ROC does not apply to probate action which are solely governed by O. 72 of the ROC. Our reasons for saying so are as follows. It will be seen quite clearly that if the matter is to be dealt with "summarily" *ie*, without a trial, then that can only happen at the stage when the non-contentious matter has morphed into a contentious probate matter per O. 72 r. 37(14) and the matter is then referred to a judge who "may dispose of the matter in dispute in a summary manner or direct that that the provisions on O. 72 of the ROC shall apply".

[63] And where a matter is directed to be disposed of summarily then following O. 71 r. 38(2) of the ROC. The originating summons, if any, "shall ordinarily be adjourned to open court for hearing and the court may on such adjourned hearing grant or refuse the prayer in the originating summons or make such other order as may be just."

[64] Looking at the sequence of events here, it is quite clear that there was no attempt by the parties in relation to OS 371 to invoke O. 71 r. 38(1) of the ROC for the matter to be dealt with summary manner. Hence, the opportunity for a summary disposal of the probate proceedings was not availed. There is no doubt that Suit 149 which was filed on 17 September 2019 was a probate action and the relevant procedure that would apply is as prescribed in O. 72 of the ROC. From our reading of O. 72 of the ROC, there is no room for the importation of O. 14 of the ROC such that probate can be granted summarily based on affidavits.

[65] In our view, once the matter is deemed to be "contested" per O. 71 r. 37(14) of the ROC, the matter become a probate action. The issues in contention must necessarily be dealt with at a trial of the action, where it will be necessary for the contestants to do all that is prescribed in O. 72 of the

ROC and to bring forward all the necessary evidence, which would include the oral testimony of the relevant witnesses such as evidence of the medical practitioners who treated the testator for his ailment (stroke).

[66] In the present case, it is obvious that it would be necessary for the plaintiffs and defendant to give oral evidence in relation to the several matters alluded to in the pleadings particularly in regard to the allegation of lack of testamentary capacity, suspicious circumstances and undue influence.

[67] There is also the issue of whether the deceased had any legal interests or rights in and over the property which would lawfully be bequeathed to the plaintiffs. In our view, O. 72 of the ROC is a special provision in the ROC which caters for contentious probate proceedings and as the title to O. 72 suggests, matters within the ambit of O. 72 are "contentious" and are not therefore amenable to be decided summarily based on affidavits.

[68] Thus, to conclude on the first issue, we do not see how O. 14 of the ROC fits into O. 72 of the ROC, particularly since probate action are meant to be disposed of *via* full trial in open court. For instance, even if a defendant does not enter appearance, O. 72 of the ROC deems that the plaintiffs are to proceed "as if" appearance has been entered and for the plaintiff to apply to set the matter down for "trial". This indicates that the manner of disposal is *via* full trial in open court.

[69] It will be seen that O. 72 of the ROC makes no mention of any summary disposal and the language employed in various intersections within that order points in the direction of a full trial in an open court. This ties in neatly with the issue of burden of proof which we alluded to earlier.

[70] It is only at a full trial (and not merely on affidavit averments) that the party propounding the impugned will, will have their day in court to adduce satisfactory evidence and satisfy the judicial conscience of the probate court.

[71] As such, we cannot fathom how the plaintiffs, as the party propounding the 2018 will can discharge their legal burden of satisfying the conscience of the probate court that the 2018 will is the last will and testament of the deceased and that he had the requisite testamentary capacity (*Banks v. Good Fellow*) at the critical moment when he executed the 2018 will (*Randolph Yap*'s case).

[72] Further we do not see how, the plaintiffs as the propounders can say that they have removed all the purported suspicious circumstances based on affidavit evidence. Surely, this has to be tested and determined *via* the evidence of witnesses who will have to be cross-examined by the other side. Likewise, the solicitors who witnessed the execution of the 2018 will must be cross-examined as to whether they were aware that the deceased had suffered a stroke in or around 2013 and how they satisfied themselves (if at all) as to the deceased's testamentary capacity. There are many pertinent

questions that will be put to them in regard to the deceased's testamentary capacity. The extent of the deceased's disabilities (both mental and physical – if any) will have to be investigated at trial.

[73] Of course, we are aware of the plaintiffs' response to this issue, namely that the deceased transferred one of his properties to the defendant in 2013 post his stroke illness. Again, this will necessitate a satisfactory explanation by the defendant at the trial.

[74] Lastly, the question as to whether the title to the property was handed over as security for a loan which was given by the deceased's father (as per the defendant's defence) or pursuant to a loan given by the deceased himself to the registered owner of the property. The JC pushed the issue away by saying that that should be taken up in a different forum. We do not think so. That issue is germane to the probate action and ought to have been dealt with at the trial and not brushed off summarily.

[75] From the grounds of judgment it seems that the JC has equated the affidavit evidence of the attesting witnesses (the solicitors) as sufficient to validate the 2018 will from the perspective of compliance with the formal requirements of s. 5 of the Wills Act 1959, but that of itself does not answer the disputed question of the deceased's testamentary capacity (or the lack of it) and does not of itself remove the purported suspicious circumstances or allegation of undue influence, all of which are disputed issues which must be dealt with at a full trial of the probate action in the ordinary way.

[76] It is apt to quote from "*Williams, Mortimer and Sunnucks on Executors, Administrators and Probate*, 18th edn, 2000 where they said that "due execution cannot be equated with knowledge and approval as it is for the party propounding the will to prove affirmatively that the deceased knew and approved of the contents of the alleged will."

[77] In terms of the burden of proof, it is clear that the JC shifted the burden on to the defendant to prove that the deceased lacked testamentary capacity when the plaintiffs had not even established by satisfactory evidence that the deceased had the requisite testamentary capacity at the critical moment when he executed the 2018 will on 17 July 2017. It is clear therefore that even if O. 14 of the ROC is deemed applicable to probate actions, we are convinced that in the present case, there are matters which are in dispute that warrant a trial of the probate action.

Outcome

[78] However, for the reasons stated above, our principal/primary conclusion is that O. 14 of the ROC is not applicable to contested probate matters which are governed exclusively by O. 72 of the ROC and which must ordinarily be dealt with at a full trial. As we said earlier, the only occasion

A when a contentious probate may be disposal off summarily is *via* the procedure as prescribed, and on the occasion when O. 71 r. 38(1) and (2) of the ROC applies.

[79] In any event, having due regard to the facts as disclosed in the affidavits and the pleadings and upon due consideration of the submissions
B of the parties, we are satisfied that there are issues which have to be determined at trial, and summary judgment ought not have been granted. We find that there are merits in the appeal as this involved a contentious probate matter that should proceed for trial. The defendant's appeal is allowed and the order of the High Court dated 23 September 2020 in respect of encl. 7
C is therefore set aside with costs in the cause.

Order accordingly.

D

E

F

G

H

I